UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BANK ONE, DEARBORN, N.A.,

Plaintiff,

v.

DONALD B. MAISEL,

Defendant.

_____/

No. C 02-0531 MHP

MEMORANDUM & ORDER RE SUMMARY JUDGMENT

Plaintiff Bank One brings this action against defendant Donald B. Maisel seeking restitution for monies mistakenly paid by Bank One's predecessor-in-interest on an unauthorized check. Now before the court is plaintiff's motion for summary judgment. After having considered the parties' arguments and submissions, and for the reasons set forth below, the court rules as follows.

BACKGROUND[1]

Maisel, an emergency room physician in Santa Clara County, collects baseball cards as a hobby. At the time of the events central to this action, Maisel was especially interested in Ken Griffey, Jr. cards. Weickhardt Dec., Exh. 1 at 4. In September 1999, Maisel won an eBay auction for a Ken Griffey, Jr. rookie "Upper Deck" card in the amount of $1737.99. Because Maisel had been defrauded in an earlier eBay transaction, he was initially wary of sending a check to the seller, John Collins. Id. at 3. A phone conversation with Collins, who claimed to be the owner of a successful medical arbitration company called John Charles & Associates, reassured Maisel that Collins was legitimate. Id. at 4. Maisel sent Collins the money on September 13, 1999. Knowing of Maisel's interest in Ken Griffey, Jr. cards, Collins offered to

sell Maisel additional cards. On September 14, Maisel sent Collins a check for $3476 for two more rookie cards, and three days later, Maisel sent another check for $958 for 400 Ken Griffey, Jr. 1990 and 1991 "Upper Deck" cards.

Through these transactions and many others, Maisel and Collins became friends. Id. They ultimately agreed to form the "High Grade Card Company," a business in which Collins would buy cards and Maisel would sell them, and the two would split the profits. Collins claimed to purchase several collections for the company, including one for $3000 that had a 1951 Mickey Mantle "Bowman" rookie card with an estimated value of $50,000 to $100,000. In early October, Collins told Maisel of an "incredible deal" – an heir to a tobacco family planned to sell 20,000 packages of tobacco, each one unopened with a baseball card inside. Collins asked Maisel for half the purchase price, or $88,000.

Maisel, however, had begun to distrust Collins. After a month of excuses, Maisel still had not received the Ken Griffey, Jr. cards he had purchased from Collins. Moreover, Maisel had received only two boxes of the promised collections that did not include the valuable Mickey Mantle card. On October 14, after calling Collins in the morning to warn him of his arrival that afternoon, Maisel flew to Indiana to visit Collins at his home. The visit reassured Maisel. Collins' stories about his life appeared to be true – he lived in a large house with a swimming pool and a tennis/basketball court – and Maisel saw numerous boxes of baseball cards from Collins' own collection. Before leaving, Maisel wrote Collins two checks for a total of $115,000, which included payment for Maisel's share of the collections bought by Collins and $4400 for future expenditures.

In December, Collins called Maisel "almost in tears" and claimed that the IRS had frozen his bank accounts because John Charles & Associates owed back taxes. Id. at 10. Collins claimed that a former employee had stolen the money. Id. On December 13, Maisel sent Collins a $20,000 loan, which Collins promised to repay in six weeks. A month later, Collins claimed the IRS was still after him and he needed more money. He offered to sell Maisel and Maisel's brother his entire collection of one-million baseball cards. Maisel, though increasingly suspicious, decided to purchase them because he had seen the boxes of cards in Collins' house. Id. at 13. Collins sent three boxes to Maisel as a sample. Id. On January 25, 2000, Maisel's brother sent $50,000 to Collins, and Collins agreed that Maisel's share would come from

the money Maisel had already paid. After a series of excuses, Collins finally sent seven boxes of the card collection to Maisel in March; the cards were "essentially worthless" and not representative of the cards Maisel had seen at Collins' house. Id. at 15.

By this time, Maisel still had not received any of the other cards promised by Collins. Fearing that he might lose his money, Maisel hired the Rat Dog Dick Detective Agency to check on Collins. The agency found several small claims judgments against Collins but no real property associated with his name. Collins' company, John Charles & Associates, had been dissolved as of September 1997. The agency's report showed that Collins had no record of criminal activity but that there were two social security numbers affiliated with the name: one for a "John E. Collins" and another for a "John C. Collins." Both names had the same date of birth and the same address.

On April 5, Maisel sent Collins five separate letters demanding a refund of $214,172: $5,214 for the three Ken Griffey, Jr. rookie cards, $958 for the four hundred 1990 and 1991 Ken Griffey Jr. cards, $100,000 for Collins' collection, $88,000 for Maisel's share of the tobacco cards, and $20,000 for the loan.[2] Maisel also filed a complaint with the joint FBI-Santa Clara Police Internet Task Force, which ultimately transferred the file to the FBI office in Concord after deciding that the case did not have a sufficient connection to the internet. In his complaint, Maisel identified Collins as a "clever con man." Id. at 18. At the same time, Maisel began to "play the FBI card" with Collins. He led Collins to believe that the FBI's investigation would result in criminal prosecution, unless Collins returned $200,000 to Maisel. The tactic worked. Collins told Maisel he would reimburse him from the sale of his card collection to a friend named Johnnie Thomas, who lived in Decatur, Georgia. Thomas would send $200,000 to Maisel directly, and the rest of the proceeds would go to Collins.

On June 12, Collins faxed Maisel a copy of an unsigned check made payable to Don Maisel, on the account of the Birmingham-Bloomfield Land Title Company ("BBLT") at the National Bank of Detroit, Dearborn. Maisel called BBLT that day to ask if the check was "good." BBLT referred him to the National Bank of Detroit, Bank One's predecessor-in-interest, which told him that the account had sufficient funds to pay the check. The next day, Maisel received a check on the same account, purportedly sent by Thomas. Although Collins had said "H. Angel" would sign the check, the signature on the check

was "V. Dantez." Moreover, the number on the check was different than the one on the faxed copy. Maisel's wife endorsed the check and deposited it in Maisel's account at Bank of America. Bank of America placed a hold on the funds, but released them a few days later. Using an automated system, Bank One processed the check and posted it to the BBLT account.

Maisel sent his brother $50,000 and returned the rest of the money to his savings and investment accounts. On June 22, Maisel sent Collins an agreement concluding their business activities and stating that the $200,000 was a "full refund" for monies owed. Weickhardt Dec., Exh. 2 at 72-73. Maisel reserved his rights to half of two collections and promised to return the cards Collins sent as a sample of his collection.[3] Id. at 73. In addition, Maisel purported to withdraw "any and all previous legal claims." Id. at 72. On August 9, Maisel sent Collins a final agreement that transferred ownership of the card company to Maisel. Collins signed both agreements.

In October, BBLT sent Bank One a forgery questionnaire affirming that the check made payable to Maisel did not have an authorized signature. Hartley Dec., Exh. 1 at 2. According to the questionnaire, BBLT first discovered that the check was forged on June 21, 2000.[4] Id. Bank One credited BBLT's account, incurring a loss of $200,000. In November, Bank One contacted Maisel to inform him that the check was counterfeit. Maisel then contacted Collins, who denied any knowledge of forgery. On June 25, 2001, Bank One sent Maisel a letter demanding repayment of the $200,000 plus interest.

LEGAL STANDARD

Summary judgment is proper when the pleadings, discovery and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id. The moving party for summary judgment bears the burden of identifying those portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). On an issue for which the opposing party will have the burden of proof at trial, the

moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." Id.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Mere allegations or denials do not defeat a moving party's allegations. Id.; see also Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 960 (9th Cir. 1994). Inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion. Masson v. New Yorker Magazine, 501 U.S. 496, 520 (1991).

The court applies California substantive law to this diversity action. All but one of the claims at issue in this motion concern Uniform Commercial Code ("U.C.C.") provisions, codified in the California Commercial Code. The court first looks to California decisions interpreting these provisions. If there are no applicable decisions, the court looks to other state courts that have interpreted identical provisions. California courts generally "afford great deference to the decisions of sister jurisdictions interpreting . . . [U.C.C.] provisions." Oswald Mach. & Equip. v. Yip, 10 Cal. App. 4th 1238,1247 (Cal. Ct. App. 1992).

DISCUSSION

Bank One alleges that Maisel is required to pay restitution under four U.C.C. provisions as codified in the California Commercial Code: (1) for acting in bad faith after a bank mistakenly pays an unauthorized check under section 3418; (2) for unjust enrichment when a payor bank brings an action as subrogee to the maker under section 4407; (3) for breach of warranty under section 3417; and (4) for conversion under section 3420. Cal. Com. Code §§ 3418, 4407, 3417, 3420. In addition, Bank One argues that Maisel should pay restitution under common law theories of unjust enrichment.

I. Mistaken Payment under Section 3418

Section 3418 describes the very situation at issue here – a bank mistakenly pays an unauthorized check and suffers a loss – and offers a remedy even if the bank acted negligently in its duties.[5] The remedy, however, cannot be asserted against a recipient of a check who (1) acted in good faith, and (2) either took the check for value or changed position in reliance on the payment.[6] Section 3418 codifies the common

law rule of Price v. Neal, 3 Burr. 1354, 97 Eng. Rep. 871 (Eng. 1762). The rule places ultimate liability for a drawer's forged signature on the drawee bank, except when the recipient of the check knew about the forgery, because "the drawee bank, possessing the signature card of the drawer, is in the best position to ascertain the forgery." Fireman's Fund Ins. Co. v. Sec. Pacific Nat'l Bank, 85 Cal. App. 3d 797, 821-22 (Cal. Ct. App. 1978) (describing the Price rationale). Commentary to the code clearly contemplates the consequences of this rule: "The result . . . is that the drawee in most cases will not have a remedy against the person paid because there is usually a person who took the check in good faith and for value or who in good faith changed position in reliance on the payment . . . ." Cal. Com. Code cmt. 1.

A. Good Faith

Bank One claims that it should not have to bear liability for its mistake because Maisel failed to act in good faith. "Good faith," Bank One argues, is determined by an objective standard that takes into account all the circumstances and facts that Maisel should reasonably have known. Maisel argues, however, that the code requires only a subjective standard of actual knowledge. Maisel acted in good faith because, he claims, he did not know the check was counterfeit. The court agrees that the standard is one of actual knowledge, and Maisel's knowledge is an issue of triable fact.

The code defines good faith as "honesty in fact in the conduct or transaction concerned." Cal. Com. Code § 1201(19). Under the commercial code, good faith is a subjective standard of actual knowledge. Louis & Diederich, Inc. v. Cambridge European Imports, Inc., 189 Cal. App. 3d 1574, 1587 (Cal. Ct. App. 1987). California courts have long held that "mere knowledge of facts sufficient to put a prudent man on inquiry" does not destroy good faith "unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith."[7] Popp v. Exchange Bank, 189 Cal. 296, 303 (Cal. 1922). Bank One, however, tries to import an objective standard by arguing that Maisel did not act in good faith because he had "notice" of the forgery from surrounding facts and circumstances. Bank One argues that these circumstances mandated an inquiry about the check, and Maisel's failure to inquire shows a lack of good faith.

Bank One relies on Fireman's Fund for the proposition that "notice" of facts indicating fraud negates good faith. Bank One's reliance is misplaced.[8] Fireman's Fund construes an earlier version of section 3418, which denied recovery if a payee was a "holder in due course." In addition to the

requirements of good faith and taking a check for value, a "holder in due course" must not have notice of any defenses to the check, including an unauthorized signature. Cal. Com. Code § 3302(a)(2). The current version of section 3418 requires only that a payee take the check in good faith and for value, a "substantive change in the law" resulting in "an easier burden to meet." Gentner and Co. v. Wells Fargo Bank, 76 Cal. App. 4th 1165, 1176 (Cal. Ct. App. 1999). Courts have found a duty to inquire only when the payee is wilfully ignoring the truth.[9] Thus, a person does not act in good faith "where the circumstances are such as to justify the conclusion that the failure to make inquiry arose from a suspicion that inquiry would disclose a vice or defect in the instrument or transaction." Christian v. California Bank, 30 Cal. 2d 421, 424 (Cal. 1947).[10]

The parties dispute whether Maisel had actual knowledge of the forgery and whether he refrained from inquiring in greater detail about the check because he suspected that the check was counterfeit. The evidence presented on this motion does not compel one conclusion. It is clear that Maisel knew Collins was a "con man" and that Collins feared arrest and prosecution. This fear, however, could cut both ways, since fear may caution against unlawful behavior. Moreover, Maisel claims that he did not know the check was counterfeit. Maisel's knowledge hinges on his credibility, and thus is an issue of fact best suited for trial. In sum, the court finds that the plaintiff has not proffered sufficient facts to place this matter beyond the reach of a reasonable juror.

B. For Value

A person takes a check for value if, among other possibilities, "[t]he instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due." Cal. Com. Code § 3303(a)(3). In this action, the counterfeit check was transferred by Johnnie Thomas to Maisel as payment for Maisel's claim against Collins. Bank One argues that Maisel could not have taken the check for value because BBLT did not know about the claim.

Section 3303 conclusively rebuts Bank One's position. That section provides that an instrument is transferred for value if it is made as payment of "an antecedent claim against *any person*," not merely an antecedent claim against the transferor. Id. (emphasis added). As the comment itself explains, "[s]ubsection (a)(3) applies to any claim against any person.... In particular the provision is intended to apply to an instrument given in *payment of or as security for the debt of a third person, even though no*

concession is made in return." Id. at cmt. 4 (emphasis added). This section of the code thus expressly contemplates the type of situation that has arisen here, where Maisel took the check as payment for the debt of a third party (Collins) and did not provide either Johnnie Thomas or BBLT with any "concession" in return.[11] Based upon the facts as represented by the parties, the court cannot grant summary judgment for plaintiff on the question of whether Maisel took the checks for value.

C. Change of Position in Reliance on Payment

Bank One concedes that Maisel did halt his attempts at recovery when he received the check but argues that Maisel could not have changed his position. Collins, Bank One claims, was judgment proof then and remains judgment proof now. Bank One relies on the private detective's report, which found no property associated with Collins. Yet this report does not provide a sufficient basis for this court to grant summary judgment to Bank One on this issue. By its terms, the report states only that the search could not find any property, not that Collins owned no property. Weickhardt Dec., Exh. 2 at 44. Maisel could have assumed that Collins owned at least one asset – the collection of baseball cards Maisel had seen – and on that basis continued his collection efforts if he had not received the check. Furthermore, after receiving the check Maisel sent Collins a signed agreement stating that he had received a "full refund" for monies owed and withdrawing "any and all previous legal claims." Id. at 72-73. While it may be possible for Maisel to rescind this offer and unwind the transaction with Collins if he is eventually forced to return the check to Bank One, this agreement stands as a further indication that Maisel injured his own cause in reliance upon the veracity of the check he received. There exists a triable issue of fact on this question, and the court denies plaintiff's request for summary judgment on its section 3418 cause of action.

II. Subrogation under Section 4407 and Unjust Enrichment

Bank One next argues that it should recover against Maisel because it is subrogated to the rights of the drawer, BBLT, against Maisel under section 4407. Section 4407 provides:

> If a payor bank has paid an item . . . under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank is subrogated to the rights of . . . the drawer or maker against the payee . . . with respect to the transaction out of which the item arose.

Cal. Com. Code § 4407(c). The purpose of the section is "to give a bank remedies to get its money back when it has improperly paid an item." Cal. Com. Code § 4407, cmt. 1. If section 4407 were to apply, Bank One would acquire any causes of action BBLT might hold against Maisel.

Bank One treats section 4407 as if it confers upon Bank One an independent cause of action that it has not elsewhere alleged. See Def. Mot., at 11 ("Third Claim For Relief: Bank One's Claim As A Subrogee Of BBLT"). However, Bank One does not clearly identify the nature of that cause of action; rather, it simply refers frequently to the fact that BBLT owed Maisel nothing and thus should be able to recoup its losses. Perhaps drawing upon the language of the statute itself, Bank One does appear at one point to identify "unjust enrichment" as the cause of action it has acquired under section 4407: "In such a case, it can not be disputed that Dr. Maisel would be unjustly enriched at the expense of BBLT because BBLT was not indebted to Dr. Maisel and Dr. Maisel knew that." Pl. Mot., at 12. This claim obviously coalesces with Bank One's separate claim for restitution, and thus the court need not determine at this juncture whether section 4407 applies. The court will simply consider plaintiff's claim for restitution on its own merits.

The commercial code allows common law actions at "law or equity" if its provisions do not specifically displace such actions. Cal. Com. Code § 1103. Neither the text of section 3418 nor 4407 specifically displaces a common law action for restitution.[12] In fact, a comment to section 4407 reserves actions at common law. Cal. Com. Code § 4407 cmt. 5 ("The spelling out of affirmative rights of the bank in this section does not destroy other existing rights (Section 1-103).") Courts in Missouri and Texas have held that a common law action for mistaken payment exists, but that it cannot conflict with U.C.C. provisions. Bryan, 628 S.W.2d at 764; Guaranty Bank & Trust, 952 S.W.2d at 790. Thus, a bank must plead its subrogor's defenses under section 4407 even in an action for unjust enrichment at common law. Bryan, 628 S.W.2d at 764; Guaranty Bank & Trust, 952 S.W.2d at 790.

The common law rule of unjust enrichment in California is substantially similar to section 3418. California follows the Restatement on Restitution. See California Federal Bank v. Matreyek, 8 Cal. App. 4th 125, 131 (Cal. Ct. App. 1992); City of Hope Nat'l Med. Ctr. v. Superior Court, 8 Cal. App. 4th 633, 636-37 (Cal. Ct. App. 1992); First Nationwide Savings v. Perry, 11 Cal. App. 4th 1657, 1662 (Cal. Ct. App. 1992). When a payment is based on mistake of fact, a payor is entitled to restitution unless the payee

has materially changed position in reliance on payment. Restatement of Restitution § 1. Thus, "restitution is commonly denied against an innocent transferee or beneficiary, if he has changed his position after the transaction and it is impossible or impractical to restore him to his original position." City of Hope, 8 Cal. App. 4th at 637. The transferee's knowledge is central to any inquiry. Thus, a party who does not know about another's mistake is not required to pay restitution if the party detrimentally relied on the benefit. Compare California Federal Bank, 8 Cal. App. 4th at 132-34 (holding that borrowers who were advised by bank that they could pay off loan without penalty did not owe restitution to bank when bank discovered its advice was in error), with First Nationwide Savings, 11 Cal. App. 4th at 1664 (holding that beneficiary could sustain an action for unjust enrichment against a nonassuming grantee of a purchase money deed of trust who profited from a trustee's mistake if the grantee knew there was a mistake). "In other words, innocent recipients may be treated differently than those persons who acquire a benefit with knowledge." First Nationwide Savings, 11 Cal. App. 4th at 1664.[13]

As discussed in Section I. above, there exists a triable issue of fact regarding Maisel's subjective understanding of the reliability of the BBLT check. Bank One's summary judgment motion on this claim is thus denied.

III. Breach of Warranty under Section 3417

Bank One claims that Maisel breached a presentment warranty under section 3417 by offering a check of which BBLT held a defense to payment.[14] Bank One claims that Maisel breached the warranty because he was not "a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of the person entitled to enforce the draft." Cal. Com. Code § 3417(a)(1). As a comment to the section makes clear, this "in effect is a warranty that there are no unauthorized or missing indorsements." Cal. Com. Code § 3417 cmt. 2. The action at bar, however, concerns a forged maker's signature, not a check that lacks the endorsement of the person to whom it was made out. Bank One has cited no cases that support its novel interpretation of this warranty.

Rather, the relevant section of the code requires that "[t]he warrantor has no knowledge that the signature of the drawer of the draft is unauthorized." Cal. Com. Code § 3417(a)(3). This warranty "retains the rule . . . that the drawee takes the risk that the drawer's signature is unauthorized unless the

person presenting the draft has knowledge that the drawer's signature is unauthorized." Cal. Com. Code § 3417 cmt. 2. This section thus demands another inquiry into Maisel subjective state of mind. As discussed above, there is an issue of material fact as to whether Maisel knew that the signature was fraudulent. The court therefore denies summary judgment on this claim.

IV. Conversion under Section 3420

A. Terms of the Cause of Action

Bank One alleges finally that Maisel converted the check. According to section 3420, "[a]n instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument." Cal. Com. Code § 3420. The California Commercial Code contains specific definitions of several of the terms contained within this cause of action that are crucial to the resolution of this legal question. Transfer is defined as delivery[15] "by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." Cal. Com. Code § 3203. Negotiation is a "transfer of possession . . . of an instrument by a person other than the issuer to a person who thereby becomes its holder." Cal. Com. Code § 3201(a). "If an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone." Cal. Com. Code § 3201(b). A "person entitled to enforce the instrument" is "the holder of the instrument" or "a non-holder in possession of the instrument who has the rights of the holder." Cal. Com. Code § 3301. A "holder" is a "person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession." Cal. Com. Code § 1201(20).

Bank One appears to be correct in alleging that the stipulated facts fulfill the necessary elements of the cause of action under this provision. A transfer from Johnnie Thomas to Maisel did take place, and that transfer cannot be considered a negotiation because it did not involve "indorsement by the holder" (viz., Maisel). Cal. Com. Code § 3201(b). In addition, Johnnie Thomas was not a "person entitled to enforce" the check at issue here. Cal. Com. Code § 3240(a).

B. Maisel's Defenses

Maisel alleges that Bank One cannot bring this claim because an "acceptor" of the instrument does not have the right to sue for conversion under section 3420. Cal. Com. Code § 3420(a)(1) ("An action for conversion of an instrument may not be brought by the . . . acceptor of the instrument."). As Bank One notes, a payor[16] is not the same as an acceptor. To have accepted the check, Bank One's predecessor-in-interest must have signed an agreement, written on the draft, to pay the draft as presented. Cal. Com. Code § 3409(a). Maisel has offered no evidence to indicate that Bank One's predecessor-in-interest accepted the check. In fact, the copy of the check does not indicate any written acceptance; while the back of the check has been stamped by Bank One's predecessor-in-interest, it has not been signed as section 3409 requires. Bowman Dec., Exh. A, at 2; Cal Com. Code § 3409(a).

C. Bank One as Proper Plaintiff

The present action does not conform to the typical set of facts that give rise to a claim for conversion. Generally, an action for conversion arises when a thief steals or falsely endorses a check and attempts to deposit it directly into a bank; the action for conversion thus runs from the person on whose account the checks were drawn against the (often well-intentioned) bank. See, e.g., Lee Newman, M.D., Inc. v. Wells Fargo Bank, 87 Cal. App. 4th 73 (Cal. Ct. App. 2001). Here, the thief (Collins or Johnnie Thomas) sent the check to Maisel, rather than to a bank; Maisel thus stands in the place of the bank in a typical conversion action, since he is the "depository" at which the thieves "cashed" their check. There are rare examples of conversion actions that are brought against non-banks. See, e.g., Stockton v. Gristedes Supermarkets, Inc., 576 N.Y.S.2d 267, 268 (N.Y. App. Div. 1991) (conversion action upheld against supermarket that offered "check cashing privileges" and cashed counterfeited checks).

However, this court has been unable to locate any authority establishing that a drawee bank may sue for conversion, and Bank One has cited no such authority to the court here. Indeed, Collins and Thomas could not have stolen the check from Bank One because the check was never Bank One's property; Bank One cannot properly bring an action for conversion of something that it never possessed. Cf. Cal. Com. Code § 3420 cmt 1 ("A is the owner of the check. B never obtained rights in the check. ... Thief stole A's property not B's."). The proper plaintiff in a conversion action against Maisel is thus BBLT, the party from whom the check was originally taken.

Bank One has not argued to this court that it may sue for conversion as a subrogee to BBLT's rights under Cal. Com. Code section 4407. See Section II, supra. Regardless, such an argument would be futile. In order to evaluate the possibility of Bank One bringing a claim under Section 4407, the court must now decide the question explicitly left open in Section II, viz., whether Bank One may be properly subrogated to the rights of BBLT under section 4407.

Section 4407 states that a payor bank is subrogated to the rights of a drawer or maker against the payee only "to prevent unjust enrichment." Cal. Com. Code § 4407. Although the case law on this issue is hardly a model of clarity, courts have generally directed their inquiry regarding "unjust enrichment" to the question of whether a *drawer or maker* who maintained her own cause of action would be capable of *recovering twice* and thus unjustly enriching *herself*. See, e.g., Danning v. Bank of Am. Nat'l Trust and Savings Ass'n, 151 Cal. App. 3d 961, 976 (Cal. App. Ct. 1984) ("Section 4407 was applicable in that instance to prevent the depositor from acquiring and retaining the double benefit of having the bank's premature payment discharge the depositor's legal obligation while also allowing the depositor to recover from the bank that same debt already paid.") (citation omitted). Bank One appears to have taken a contrary view, arguing that the "unjust enrichment" at issue refers to the payee (Maisel) instead. See Pl. Mot., at 12 ("[I]t can not be disputed that Dr. Maisel would be unjustly enriched at the expense of BBLT...").

Plaintiff cannot maintain an action for conversion via section 4407 under either understanding of "unjust enrichment." First (according to the drawer-based theory of unjust enrichment) , no avenue exists by which BBLT might unjustly enrich itself were it to attempt to bring its own conversion claim. Since BBLT was compensated for its loss it can allege no damages (and has acquired no ancillary benefit through this series of transactions), and thus BBLT could not possibly collect *twice* were it to litigate the matter further. By contrast, cases that have allowed subrogation under section 4407 have involved the threat of actual dual benefit to the wronged party. See, e.g., Siegel v. New England Merch. Nat'l Bank, 386 Mass. 672, 675 (1982) ("As the bank points out, the depositor's realization of this claim may produce unjust enrichment. Even when an item is not properly payable, due to prematurity or a stop payment order, the bank's payment may discharge a legal obligation of the depositor, or create a right in the depositor's favor

against the payee.") (cited by Danning, 151 Cal. App. 3d at 976). The court therefore finds that there is no risk of unjust enrichment of BBLT.

Second (according to Bank One's payee-based theory of unjust enrichment), as described above, Bank One is not entitled to summary judgment on its claim for unjust enrichment against Maisel. See Section II, supra. "Unjust enrichment" is a term of art that carries specific legal significance under California law. If Bank One cannot demonstrate for the purposes of this motion that Maisel has been unjustly enriched, it correspondingly may not employ statutory tools reserved solely "to avoid unjust enrichment" of payees such as Maisel. Lacking specific case authority permitting Bank One to bring an action for conversion against Maisel, the court holds that Bank One is not a proper plaintiff in such an action. Plaintiff's motion for summary judgment as to this claim is denied.[17]

CONCLUSION

For the foregoing reasons, the court DENIES plaintiff's motion for summary judgment.

IT IS SO ORDERED.

Dated:

MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

ENDNOTES

1. All facts in this section are contained in the parties' joint statement of undisputed facts, unless otherwise noted.

2. From the evidence presented, Maisel paid Collins $141,172, and Maisel's brother paid Collins $50,000. The total owed was thus $191,172, less the value of any cards Maisel had received. Collins and Maisel later agreed, however, that the amount owed by Collins was $200,000. JUF ¶ 71.

3. Bank One alleges that Maisel kept the cards sent by Collins, valued at $20,000 to $40,000. JUF ¶ 70. In an addendum to the task force complaint, however, Maisel claimed that he sent back "the thousands of worthless cards he [Collins] sent me." Weickhardt Dec., Exh. 1 at 19.

4. Bank One's records indicate that Bank of America faxed a copy of the check to BBLT on June 21. BBLT confirmed that the check was not authorized and believed the check would not be presented for payment. JUF ¶ 76, Plf's Resp. BBLT then informed Bank One's predecessor-in-interest that the account should be placed on a "caution", but the check had already been paid. Bowman Dec. ¶ 4. It is undisputed that Bank of America never informed Maisel that the check was forged. JUF ¶ 73.

5. Section 3418 provides: "[I]f the drawee of a draft pays or accepts the draft and the drawee acted on the mistaken belief that . . . the signature of the drawer of the draft was authorized, the drawee may recover the amount of the draft from the person to whom or for whose benefit payment was made . . . . Rights of the drawee under this subdivision are not affected by failure of the drawee to exercise ordinary care in paying or accepting the draft." Cal. Com. Code § 3418(a).

6. "The remedies provided by subdivision (a) . . . may not be asserted against a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment or acceptance." Cal. Com. Code § 3418(c).

7. A comment to an earlier version of section 3302, which defines a "holder in due course," stated that "[t]he presence of suspicious circumstances sufficient to put a reasonably prudent person on inquiry does not negative the existence of good faith." The current version does not include this comment, but Bank One has cited no support for the proposition that the standard has changed.

8. Inasmuch as Bank One relies on other cases for an "objective" standard of good faith, its reliance is also misplaced. E.g., Maley v. East Side Bank of Chicago, 361 F.2d 393 (7th Cir. 1966) (holding that bank was not a "holder in due course" because it had actual knowledge in paying checks that it was violating a bank resolution); Simpson v. Western National Bank, 497 P.2d 878 (Wyo. 1972) (holding that a bank did not act in good faith because it had actual knowledge of a payee's financial insolvency and deliberately misled the drawer); Wilson v. Mid-West State Bank, 186 N.W. 891 (Iowa 1922) (holding that a defect on the face of a check is enough to indicate bad faith).

9. These cases usually examine good faith in the context of a "holder in due course." Unlike Fireman's Fund, the holdings of these cases can be applied to the action at bar because the issue is good faith, not notice.

10. Bank One also argues that Maisel had a duty to inquire of the drawer about the check because the check came from a third party. Bank One misstates the applicable law, which mandates inquiry when a payee seeks to deposit checks made payable to a third party. See, e.g., Sun 'n Sand, Inc. v. United California Bank, 21 Cal. 3d 671, 694 (Cal. 1978) (holding that a bank has a duty of inquiry when there is "an attempt by a third party to divert the proceeds of a check drawn payable to the order of a bank to the benefit of one other than the drawer or drawee"); Borello v. Perera Co., Inc., 381 F.Supp. 1226 (S.D.N.Y. 1974) (holding that a company has a duty of inquiry when it accepts a check paid to the credit of another firm and internally credits that firm's account).

11. In support of its argument Bank One cites Blue Cross Health Service, Inc. v. Sauer, 800 S.W.2d 72, 77 (Mo. Ct. App. 1990), in which an insurer mistakenly sent checks to the father of the insured boy to whom it owed money, not to the son himself. Although the father claimed that the insurer was satisfying its debt to a third party (the son), and despite the fact that the father had paid the son's medical expenses, the court held that the checks were not taken for value. The court opined that there is no value if the maker does not have an "interest or awareness" of the claim. "One can only take 'for value' by giving in return something of value to the one from whom the instrument is taken." Id. at 77. In Godat v. Mercantile Bank of Northwest County, 884 S.W.2d 1, 6 (Mo. Ct. App. 1994), the court held that a plaintiff did not take a cashier's check for value because he was not owed money by a broker, even though the broker represented that the plaintiff had $500,000 in an account. The court characterized the "for value" test as an objective one, in which a plaintiff must prove more than a subjective belief that value was given. Id. Nonetheless, this court is loath to follow dictum in Missouri decisions in the face of unambiguous California statutory language.

12. Comments to section 3418, however, state that the current version "specifically states the right of restitution" for mistaken payments, replacing a past version that was "simply a limitation on the unstated remedy under the law of mistake and restitution." Cal. Com. Code § 3418 cmt. 1.

13. Bank One cites other cases, but these do not help its cause. Ghirardo v. Antonioli, 14 Cal. 4th 39, 54 (Cal. 1996), (finding that purchaser of real property did not detrimentally rely on a mistaken lower payoff demand and thus was unjustly enriched); Lectrodryer v. SeoulBank, 77 Cal. App. 4th 723, 726 (Cal. Ct. App. 2000) (finding there was sufficient evidence that a bank was prepaid for a letter of credit and thus the bank's refusal to honor a letter of credit created unjust enrichment); Bank of America v. Sanati, 11 Cal. App. 4th 1079, 1089 (Cal. Ct. App. 1992) (holding that wife and children did not detrimentally rely on funds erroneously transmitted by a bank, so they were unjustly enriched).

14. Technically, Bank America presented the check to Bank One's predecessor-in-interest for payment, but Maisel, as a previous transferor of the draft, is subject to the warranties at the time of transfer. Cal. Com. Code § 3417.

15. Delivery is the "voluntary transfer of possession." Cal. Com. Code § 1201(14).

16. Bank One is undisputedly the payor of this check.

17. In addition, permitting plaintiff to proceed on its theory of conversion would—in a sideways fashion—carve a substantial exception into the "good faith" defense to payment by mistake delineated in Cal. Com. Code section 3418(c). It is improbable that the legislature could have intended such an effect here.